No. 81473-2

SANDERS, J. (dissenting)—The majority holds the driver's license suspension procedures in RCW 46.20.245 and 46.20.289 comply with due process because the procedures provide notice and a meaningful opportunity to heard. Majority at 2-3. In *City of Redmond v. Moore*, 151 Wn.2d 664, 677, 91 P.3d 875 (2004) we held the statutory procedures under former RCW 46.20.289 (2002) and former RCW 46.20.324(1) (1965) were unconstitutional because they violated procedural due process. In response to that decision, the legislature amended RCW 46.20.289 and enacted RCW 46.20.245 to supposedly cure constitutional deficiencies identified in *Moore*.

In this action challenging RCW 46.20.245 and the procedures afforded a driver facing suspension for nonpayment of a traffic infraction, the superior court held that RCW 46.20.245 failed to cure the statutory deficiencies, finding it unconstitutional. Direct review was granted, and the majority reversed. I disagree with the majority and would affirm the superior court to hold RCW 46.20.245 unconstitutional.

I agree with the majority that we must apply the *Mathews*[1] balancing test to ensure the due process requirements are met, but disagree with the majority's

[1] *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

conclusion "that the *Mathews* factors weigh in favor of the city." Majority at 9. The United States Supreme Court has stated, "[t]he fundamental requirement of due process is the opportunity to be *heard* 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (emphasis added) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1976)). The majority correctly finds that one has a substantial privacy interest in one's driver's license under the first *Mathews* factor. *See id*. at 335. However under the second factor, contrary to what the majority asserts, the new administrative review does not fix "'[t]he fatal defect'" identified in *Moore*—the lack of an administrative hearing prior to suspension. *Moore*, 151 Wn.2d at 672 (quoting *Warner v. Trombetta*, 348 F. Supp. 1068, 1071 (M.D. Pa. 1972)).

RCW 46.20.245 provides that a person facing suspension may request a predeprivation administrative *review*, not a *hearing*, to correct any ministerial errors, the request of which stays the suspension. The statute also permits a postdeprivation appeal, which does not stay the suspension. The flaw remaining in the current RCW 46.20.289 is that it requires that "[t]he department *shall* suspend all driving privileges of a person when the department receives notice from a court . . . that the person has failed to . . . " respond, appear, pay, or comply with a notice of traffic infraction. No adequate basis exists under the statute to challenge the validity of such court notification.

Here, following notice from a court, the Department of Licensing (DOL) mailed a driver facing suspension a letter informing the driver of the suspension. Clerk's Papers (CP) at 169. This notice informed the driver (1) when his driving privilege will be suspended, (2) whom he may call or write to determine how to avoid suspension, and (3) how to appeal the suspension. The notice directs the driver desiring an administrative review to "return the enclosed form or submit a written request," but the form does not permit the driver to request an in-person hearing to challenge the basis for the suspension. CP at 169.

RCW 46.20.245 provides for an internal document review by DOL. But such review is unable to address any erroneous deprivations discussed in *Moore*, 151 Wn.2d at 673 (misinformation in DOL documents causes erroneous eight-month suspension; false identification by DOL causes erroneous suspension for over one month). An internal review of the DOL's documents results in a review of the same potential erroneous documents that necessitated a hearing to prevent erroneous deprivation in the first place. *See* RCW 46.20.245(2)(a) ("[A]dministrative review . . . shall consist solely of an internal review of documents and records submitted or available to the department . . . ."). For example, if a person submitted proof that the fine had been paid or that he or she was not the person who committed the infraction, it makes no difference to DOL when deciding whether to suspend the person's license.

The DOL agent's testimony confirmed the inadequacy of the legislature's

attempt to correct the statute. The representative testified a driver facing suspension does not have the right to request something other than the document review prior to DOL's suspending his or her license. CP at 121 (stating that a "hearing" is reserved for revocation proceedings and an "interview," or document review, is for suspension proceedings). The DOL representative also testified a person facing suspension could submit any outside evidence to the department to facilitate correcting ministerial errors. But the letter DOL mails to a person facing suspension does not inform the person of this right. This process does not adequately guard against the risk of erroneous deprivation of the important private interest in a driver's license. Here, the second *Mathews* factor weighs in favor of Shin Lee. *See Mathews*, 424 U.S. at 334-35.

A hearing must be meaningful both in time and the opportunity to be *heard*. *Id*. at 333. But an administrative review that gives no opportunity to rebut the basis for the suspension cannot be characterized as meaningful. These procedural "safeguards" remain inadequate and fail to address the concerns raised in *Moore*, 151 Wn.2d 664, and the requirements for the opportunity to be heard, which was mandated by the United States Supreme Court in *Mathews*, 424 U.S. 319. By failing to provide a driver a meaningful opportunity to challenge the suspension, the risk of erroneous deprivation remains as it was in *Moore*.

The final factor *Mathews* considers is the State's interest in the fiscal and administrative burden that additional or substitute procedural requirements would

entail. *Mathews*, 424 U.S. at 334-35. The majority asserts, "the city does have an interest in the efficient and cost-effective administration of the driver's license system, as well as ensuring that drivers appear, pay, and comply with the terms of traffic citations." Majority at 9. But the majority overlooks our analysis of this factor in *Moore*. As the majority asserts and as we held in *Moore*, there is no evidence in the record of the potential cost to provide additional procedures. Majority at 8-9; *Moore*, 151 Wn.2d at 677. We were not persuaded in *Moore*, nor should we be here, that the burden of providing hearings to individuals whose licenses were suspended outweighed the risk of error and benefit of providing hearings to correct errors. *Id*. at 677.

A more appropriate legislative fix would afford a driver a meaningful opportunity to address, in person, (1) whether the DOL records correctly identified the driver and (2) whether the information the DOL received from the court accurately describes the action it took. A proper presuspension hearing for a driver seeking to challenge the suspension is not complicated. Such a hearing would involve determining (1) whether he or she received the infraction and (2) whether he or she failed to respond, appear, pay, or comply with the notice of infraction. This type of procedure is provided in other "types" of license suspension proceedings. Little, if any, additional administrative burden exists to negate this type of hearing here.

RCW 46.20.245 does not afford drivers facing a license suspension minimal

due process. As aforementioned, RCW 46.20.245 fails to cure the statutory deficiencies identified in *Moore*.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: